No. 78-740

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Constitution, treaties, statutes and regulations—Continued — Page

Constitution, treaties, statutes and regulations—Continued — Page

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-740

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-15a) is not yet reported.

JURISDICTION

This case was decided by a three-judge district court convened under 28 U.S.C. (1970 ed.) 2282. Judgment was entered on June 7, 1978 (J.S. App. 16a-17a). A notice of appeal to this Court was filed on July 5, 1978 (J.S. App. 18a-19a). On

September 12, 1978, Mr. Justice White extended the time for docketing the appeal to and including November 2, 1978, and the appeal was docketed on that date. On February 21, 1979, this Court noted probable jurisdiction (A. 61). This Court's jurisdiction is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under the Eagle Protection Act and the Migratory Bird Treaty Act to forbid commercial transactions in birds and parts of birds that were lawfully killed prior to the date the species came under federal protection.

STATUTES AND REGULATIONS INVOLVED

Sections 1 and 2 of the Eagle Protection Act, 16 U.S.C. 668 and 668a; Sections 2, 3, and 12 of the Migratory Bird Treaty Act, 16 U.S.C. 703, 704, and 711; and pertinent regulations of the Secretary of the Interior, 50 C.F.R. 22.2(a) and 50 C.F.R. 21.2(a), are set forth in J.S. App. 20a-25a.

STATEMENT

1. Although the bald eagle has been protected by the Eagle Protection Act (16 U.S.C. 668 *et seq.*) since 1940, it remains an endangered species throughout most of the 48 coterminous states (43 Fed. Reg. 6230 (1978)). Even in the Northwest and the upper Great Lakes Region, where the bald eagle is most frequently found, it is a threatened species (*ibid.*).

Surveys conducted by the Fish and Wildlife Service in 1974 and 1975 showed only 318 active nests throughout Minnesota, Wisconsin, and Michigan, 103 active nests in Washington, and 63 in Oregon.[1] Although the bald eagle's range covers the entire country (*id.* at 6231), the surveys showed only 232 active nests in the entire southern half of the country (below the 40° N. parallel).[2] This precarious situation is in part due to the widespread loss of siutable habitat, but the Service reports that "[s]hooting continues to be the leading cause of direct mortality in adult and immature bald eagles, accounting for about 40 to 50% of birds picked up by field personnel" (*id.* at 6232).[3]

In enacting the Eagle Protection Act in 1940, Congress attempted to protect this country's eagle population by imposing stringent restrictions on the taking of eagles, coupled with a total prohibition on commercial transactions in the birds (16 U.S.C. 668). Section 1 of the Act (16 U.S.C. 668) makes it un-

---

[1] The reproduction rate in these areas is apparently better than in the rest of the country, perhaps because the eagles there are in closer proximity to the larger populations that survive in Alaska and Canada (43 Fed. Reg. 6230 (1978)).

[2] One hundred and fifty of these nests were in Florida. North of the 40th parallel, there were 16 nests in California, 33 in Maine, and 26 in all the rest of the coterminous states outside the Northwest and upper Great Lakes region. 43 Fed. Reg. 6231 (1978).

[3] The Fish and Wildlife Service reports that there were 208 investigations under the Eagle Protection Act pending on December 31, 1978. The great majority of these involved the killing of bald and golden eagles; others involved commercial violations.

lawful—and subject to a maximum penalty of $10,000 and two years' imprisonment—to knowingly or wantonly possess, take, buy, sell, barter, or transport any bald eagle or golden eagle,[4] alive or dead, "or any part, nest, or egg thereof," except as permitted by the Act.[5] The Act authorizes the Secretary of the Interior to permit "the taking, possession, and transportation of [eagles]" for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or as necessary to protect wildlife or agricultural interests, but only when he has determined, after investigation, that such taking "is compatible with the preservation of the bald eagle or the golden eagle." 16 U.S.C. 668a.[6]

The Act contains no authorization to the Secretary to permit the purchase, sale, or barter of any eagles or their parts. It does provide, however, that nothing

[4] The Act originally applied only to bald eagles. It was amended in 1962 to cover golden eagles as well. Although not quite so scarce as bald eagles, golden eagles are also threatened with extinction, and are difficult to distinguish from bald eagles before maturity. S. Rep. No. 1986, 87th Cong. 2d Sess. 6 (1962); 76 Stat. 1246.

[5] Each taking or other prohibited act with respect to a single eagle constitutes a separate offense (16 U.S.C. 668(a)). A civil penalty of up to $5,000 is also provided for each violation of the Act; neither a knowing nor a wanton violation need be shown for assessment of the civil penalty. Compare 16 U.S.C. 668(b) with 16 U.S.C. 668(a).

[6] In addition, the Secretary may permit the taking, transportation, and possession for falconry of golden eagles that would otherwise be subject to taking because of depredations on wildlife or livestock (16 U.S.C. 668a). See also the Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, Section 9, 92 Stat. 3114-3115.

in the Act prohibits the "possession or transportation" of eagles or their parts that were lawfully taken before the Act applied to them. 16 U.S.C. 668(a). The Secretary of the Interior's regulations, 50 C.F.R. 22.2(a), implement this proviso. They state that eagles or parts of eagles lawfully acquired before the date they came under the Act's protection "may be possessed or transported" without a permit issued under the Act, "but may not be imported, exported, purchased, sold, traded, [or] bartered * * *."[7]

The Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. 703 *et seq.*, reflects a similar congressional concern about the possible extinction of many other species of migratory birds,[8] most of which fortunately have not reached the precarious condition of the bald eagle.[9] The MBTA was originally enacted

[7] The original regulations, promulgated in April 1941, provided that "no bald eagles, parts thereof, mounted specimens, or nests or eggs thereof may be purchased, sold or offered for sale in the United States * * * [but] [b]ald eagles, * * * [or] any parts thereof * * * lawfully acquired prior to June 8, 1940, may be possessed or transported without a Federal permit" (Section 6.1(a) and (c), 6 Fed. Reg. 1966 (1941)). The current phrasing of the prohibition was first used when the regulations were amended to reflect the extension of the Act's protections to the golden eagle, 28 Fed. Reg. 975 (1963).

[8] The almost 200 species of birds to which the MBTA now applies are identified by common and scientific name in 42 Fed. Reg. 59358-59362 (1977).

[9] Some have. The Fish and Wildlife Service reports that the population of American peregrine falcons in the 48 coterminous states has dopped to about 150 nesting pairs, and the species is now listed as endangered (50 C.F.R. 17.11). Illegal hunting of migratory birds is an increasing problem. The

in 1918, to implement the terms of a treaty between the United States and Great Britain to protect identified species of birds whose annual migrations cross our border with Canada (40 Stat. 755); H.R. Rep. No. 243, 65th Cong., 2d Sess. (1918). See *Missouri v. Holland*, 252 U.S. 416 (1920). It was amended in 1936 (Convention between the United States and Mexico, February 7, 1936, 50 Stat. 1311, T.S. No. 912) and 1974 (88 Stat. 190) and 1978 (Pub. L. No. 95-616, 92 Stat. 3112) to reflect the conclusion of similar treaties with Mexico, Japan, and the Soviet Union.[10] All four treaties express the concern of the contracting nations that the species of birds to which the treaties apply are threatened (Convention between the United States and Great Britain, August 16, 1916, 39 Stat. 1702, T.S. No. 628; Treaty with Mexico, 50 Stat. 1311; Convention between the United

Fish and Wildlife Service reports 2,454 investigations under the MBTA pending on December 31, 1978, compared with 439 pending on June 30, 1975.

[10] Additional species came within the MBTA when they were brought under the Mexican treaty in 1972 by an agreement pursuant to Article IV of the treaty (Exec. Order No. 11629, 36 Fed. Reg. 20647 (1971); letter of March 10, 1972 of U.S. Ambassador to Mexico (23 U.S.T. 260, T.I.A.S. No. 7302)). The Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3110, authorizes the Secretary to issue regulations implementing the treaty with the Soviet Union for the conservation of migratory birds and their environment concluded on November 19, 1976 (92 Stat. 3112). No such regulations have been issued to date.

States and the Soviet Union, November 19, 1976, 7 Envir. L. Rep. 40318).

The MBTA in terms applies to "any migratory bird [or] any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed, in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States" and Great Britain, Mexico and Japan. 16 U.S.C. 703.[11] Like the Eagle Protection Act, the MBTA makes it unlawful to take, possess, buy, sell, barter, or transport any bird to which it applies, or any part thereof, except as permitted by the Act (16 U.S.C. 703). It also authorizes the Secretary of the Interior to issue permits for activities otherwise prohibited, but gives him greater discretion in determining which activities to allow. Thus, the Secretary may, after considering specified statutory factors,[12] "determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, * * * possession, sale, purchase, [or] shipment" of covered birds or their parts. 16 U.S.C. 704. Although the MBTA contains no specific exemption for birds or parts acquired before they were protected by the Act, the Secretary has exercised his discretion under the Act

[11] The reference to products was included for clarification when the Act was amended in 1974 (H.R. Rep. No. 93-936, 93d Cong. 2d Sess. 2 (1974)).

[12] These factors include the "distribution, abundance, economic value, breeding habits," and migratory flight patterns of the birds involved (16 U.S.C. 704).

to provide an exemption similar to that in the Eagle Protection Act for the possession and transportation of birds and parts of birds legally acquired before they were covered by the MBTA, but not for their purchase, barter, or sale (50 C.F.R. 21.2(a)).[13]

2. Appellees deal in Indian artifacts. Appellees Douglas and Carol Allard, Pierre and Sylvia Bovis, and Robert Ward own stores that sell such artifacts; appellee Eros is an appraiser of them; and appellee Kelley is employed by the Bovises in their store (A. 10-14). Appellees Douglas Allard and Pierre Bovis have previously been convicted for violations of the Eagle Protection Act and the MBTA (A. 11-12). The Allards, the Bovises, and Ward claim that they own artifacts composed in part of the feathers of eagles and various migratory birds "purportedly within the Eagle Protection Act and the Migratory Bird Treaty Act, but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to" those Acts (A. 10, 11-12, 14).[14]

[13] In addition, the Secretary has provided that museums, zoos, and public scientific or educational institutions may purchase and sell migratory birds and their parts among themselves. 50 C.F.R. 21.12. No similar provision is contained in the regulations implementing the Eagle Protection Act, although eagles and their parts forfeited under the Act may be lent to museums, scientific or educational institutions, or zoos (50 C.F.R. 22.13).

[14] Although appellees contend that "[t]he artifacts were created and lawfully owned prior to the effective date of Federal protection" of the birds (Motion to Affirm at 2; cf. *id.* at 9, 13), they do not contend that they owned them before that date. See A. 54.

Specifically, the Allards have identified twelve such artifacts with an alleged total value of $10,300 (A. 55-56); Pierre Bovis has identified 10 such items with an alleged value of $11,950 (A. 58-59);[15] and Ward has identified 10 such items with an alleged value of $21,150 (A. 52-53).[16]

3. Appellees filed this action in the United States District Court for the District of Colorado against the Secretary and certain of his subordinates. They contended that the Eagle Protection Act and the Migratory Bird Treaty Act should not be construed to apply to feathers from birds lawfully killed before the species came under federal protection. They claimed that the Secretary exceeded his authority by applying the Acts to prohibit commercial activity in such preexisting artifacts. If the Secretary's regulations were authorized, then, they contended, the prohibition of commercial activity in previously acquired bird parts constituted a taking of property without due process in violation of the Fifth Amendment (A. 18). The appellees argued that the application of the Acts to pre-existing bird parts had so slight a relation to the protection of current bird

[15] Although he identifies these as his artifacts (A. 58), he also states that "These items were on consignment to me from various private collectors * * *. These have been returned to their owners until the law is amended" (*id.* at 59).

[16] Eros, who alleges in the complaint only that he is an appraiser (A. 13), also identified, in response to interrogatories, 16 artifacts that he owned, with a total alleged value of approximately five thousand dollars (A. 50). Of these, 7 are dated after the MBTA became effective, and contain feathers of unknown type (*ibid.*).

populations as to be arbitrary and capricious. They did not, in terms, claim any taking of property without just compensation.[17]

On cross-motions for summary judgment, the district court ruled for appellees.[18] The court decided no constitutional issue, but expressed "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products" (J.S. App. 13a). To avoid the supposed constitutional problem, the court interpreted the Acts as "not applicable to preexisting legally-obtained bird parts or products therefrom," and accordingly held the Secretary's regulations invalid insofar as they prohibit commercial activity in such articles (J.S. App. 13a-14a). Although the court assumed that there is no scientific method for accurately detecting the age of feathers, it concluded that "these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination" (J.S. App. 5a).

[17] In addition, appellees claimed that the statutes were in excess of Congress' constitutionally delegated powers, and unconstitutionally vague (A. 18-20). The appellees also contended that certain species had been added to the list of those protected under the Migratory Bird Treaty Act pursuant to an improper delegation of authority in the convention between the United States and Mexico. The district court did not reach these issues, and appellees apparently do not intend to press them in this Court. See Motion to Affirm at 3-4.

[18] Because injunction relief was sought, and because the district court took the view that the constitutional arguments were not frivolous, a three-judge court was convened pursuant to 28 U.S.C. (1970 ed.) 2282. Although this statute was repealed in August 1976 (Pub. L. No. 94-381, 90 Stat. 1119), Section 7 (90 Stat. 1120) provides that it does not apply to actions already commenced.

In its judgment, the court declared the Secretary's regulations invalid and unenforceable "as against the Plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute" and enjoined the Secretary from interfering with the exercise of those rights "including the rights of sale, barter or exchange" (J.S. App. 16a-17a).

SUMMARY OF ARGUMENT

1. It is impossible to determine the age of feathers with any accuracy, and ancient feathered Indian artifacts are frequently rare and highly prized. Thus, there is a strong incentive to use new feathers to repair or to counterfeit ancient artifacts. The Acts and regulations at issue are designed to protect current bird populations by minimizing this incentive.

Section 1 of the Eagle Protection Act, 16 U.S.C. 668, prohibits the possession, sale, purchase, or transportation of any bald or golden eagles or their parts except as permitted by the Act. Section 1(a) of the Act, 16 U.S.C. 668(a), permits the possession or transportation of such eagles or eagle parts, if the birds were lawfully taken prior to the date they came under the Act's protection. The Act thus plainly forbids the buying or selling of eagle parts, regardless of when the eagles were taken. The Act's structure and legislative history confirm that Congress intended a total ban on commercial transactions in eagle

feathers. This is not an unusual legislative approach. Both Congress and state legislatures have often enacted statutes forbidding the sale of legally taken animals in order to facilitate local game controls and protect local wildlife.

The Migratory Bird Treaty Act also prohibits the possession, sale, purchase, or transportation of any bird or bird part protected by the treaties with Great Britain, Mexico and Japan, except as permitted by regulations issued by the Secretary under the Act. Section 3 of the Act, 16 U.S.C. 703, authorizes the Secretary to determine whether to allow the taking, possession, purchase or sale of protected birds or bird parts. The Secretary's regulation forbidding the buying and selling of the feathers of protected birds, no matter when the birds were killed, is authorized by the Act.

2. The prohibition on the sale of artifacts containing feathers of birds killed before the effective dates of the Acts does not constitute a taking of appellees' property without just compensation in violation of the Fifth Amendment. First, appellees do not contend that they themselves possessed any artifact at the time the statute prohibiting its sale was enacted. Since the only persons whose property was arguably "taken" by the statutes at issue were those who owned the artifacts when they became subject to the prohibtion on their sale, appellees have no standing to claim a denial of just compensation.

In any event, the factors identified in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978), indicate that these statutes involve the adjustments of economic benefits and burdens for the common good, rather than a taking of property for governmental purposes that requires just compensation. Finally, if such compensation is constitutionally necessary, appellees' remedy is a suit for payment in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, rather than a declaration that the Eagle Protection Act and the MBTA are unconstitutional.

ARGUMENT

I. The Eagle Protection Act Requires, And The Migratory Bird Treaty Act Permits, The Secretary to Ban Commercial Transactions Involving Feathers Taken From Birds Killed Before The Species Came Under Federal Protection.

The record establishes two facts that bear importantly on the interpretation of the statutes at issue here: First, feathered Indian artifacts predating the enactment of the statutes may be highly valued items (A. 50-56), so that if there is a commercial market for them, there is inevitably a strong incentive to attempt to pass recent copies off as originals, or to replace feathers in existing artifacts. Second, there is no effective way, from observation or scientific tests, to determine the age of bird feathers; and it is therefore impossible to know whether any particular feathers antedate the enactment of the relevant statute (A. 44-46, 48-49).[19] This combination of

[19] In contrast, the provision in the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3760-3761,

incentive and opportunity poses a real threat to the living bird population, the only source of the necessary feathers, and thus requires stringent measures. It also justifies the conclusion of Congress and the Secretary that the alternative protective measures suggested by the district court (J.S. App. 5a) are inadequate.[20]

A. *The Eagle Protection Act*

1. The language of the Eagle Protection Act is clear: "Whoever * * * shall * * * take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import * * * any bald eagle * * * or any golden eagle, alive or dead, or any part, nest or egg thereof * * * shall be fined * * * or imprisoned * * *: *Provided* * * * that nothing herein shall be construed to prohibit possession or transportation of

---

permitting the importation of goods made before 1830 from the parts of endangered or threatened species, was based on advice from the Customs Service that experts can readily distinguish articles made before that date from those made thereafter. H.R. Conf. Rep. No. 95-1804, 95th Cong., 2d Sess. 24 (1978).

[20] In addition to the obviously difficult enforcement and administrative problems inherent in the registration or affidavit methods of control suggested by the district court, the current bird populations would be deprived of all protections while these systems were being established. Even a relatively short de facto "open season" on such birds as bald eagles could seriously affect the survival of the species in this country (see *supra*, page 3). In any event, the need for, and adequacy of, specific protective measures is a question for the legislature or the Secretary under a statutory delegation of authority, not the courts. See *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 39-40 (1908); cf. *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978) slip op. 8-9, *TVA* v. *Hill*, 437 U.S. 153, 194 (1978).

any bald eagle * * * or any part * * * thereof lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle * * * or any part * * * thereof, lawfully taken prior to [October 24, 1962]." Neither appellees nor the court below have suggested any basis for reading the narrow proviso, expressly exempting only the *possession* and *transportation* of eagles and eagle parts taken before they were safeguarded by the Act, as creating an implied exemption from the broad ban, announced in the same sentence, on any commerce in bald or golden eagles or their parts. Indeed, the text leaves little doubt that Congress focused on the precise problem of property interests in existence at the time of enactment, carefully weighed those interests against the need to protect the eagle from extinction, and struck the balance by condoning continued ownership and gratuitous transfers but outlawing commercial transactions for the future.

The Eagle Protection Act as a whole confirms the conclusion that Congress intended to prohibit *all* commerce in eagles and their parts, whenever taken. The statute enacts a comprehensive ban on all dealings in eagles, coupled with the grant of authority to the Secretary to make narrow exceptions under specifically identified circumstances.[21] Thus, although the

---

[21] For example, the Secretary "may permit the taking, possession and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry." 16 U.S.C. 668a.

Secretary may authorize the "taking, possession and transportation" of specimens for public museums, scientific societies and zoos, or for Indian religious purposes, or to protect wildlife or livestock (16 U.S.C. 668a), the Act nowhere empowers the Secretary to make any exception to the flat ban on the sale, purchase or barter of any eagle part.[22]

The legislative history also suggests that Congress was deeply concerned about the precarious situation of the eagle, and intended to provide maximum deterrence to the killing of eagles. There is no hint of an unexpressed intent to permit the continuation of even a limited market for eagle feathers. The Act was revised in 1972 to provide for increased penalties and to require a less specific criminal intent, in response to a report that commercially motivated airborne hunting parties the previous winter had killed "nearly 500 rare bald and golden eagles." H.R.

[22] The Secretary's regulations implementing the Eagle Protection Act have consistently reflected the Act's total ban on all sales of eagle feathers (see note 7, *supra*). This uniform interpretation of the agency charged with the administration of the Act is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The court below was in error when it implied that the regulatory prohibition was first promulgated in 1974 (J.S. App. 3a-4a). The current prohibitory language of 50 C.F.R. 22.2 first appeared in the regulations when they were revised in 1963 to reflect the extension of the Act to golden eagles (50 C.F.R. 11.8(b), 28 Fed. Reg. 975-976 (1963)). Nothing in either the statement of considerations for the revised regulations or the notice of proposed rulemaking on which they were based (27 Fed. Reg. 12138 (1962)) suggested that the rephrasing of the prohibition involved any change in preexisting regulatory policy.

Rep. No. 92-817, 92d Cong., 2d Sess. 4-5 (1972). At that time, Congress reviewed the implementation and enforcement of the Act (see *id.* at 6-7) and must have been aware of the Secretary's regulations explicitly providing that eagle parts lawfully acquired before 1940 or 1962 may be possessed and transported "but may not be * * * purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter" (50 C.F.R. 11.8(b) (1963)). Yet, far from expressing any disagreement with this interpretation of the statute, Congress strengthened the Act to facilitate the prosecution of alleged violators —the precise function served by the regulatory provision. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).[23]

[23] Congress has recently provided that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to * * * exercise the traditional religions of the American Indian * * * including * * * use and possession of sacred objects." American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469. In explaining the purpose of this provision, the Senate Report notes: "prohibiting the possession and exchange by Indians of feathers in one's family for generations, or the use of feathers acquired legally does not help preserve endangered species. It does prevent the exercise of American Indian religions." S.Rep. No. 95-709, 95th Cong., 2d Sess. 3 (1978).

The Eagle Protection Act expressly permits the possession of parts of eagles lawfully taken before 1940, and permits eagles to be taken for Indian religious purposes under permits from the Secretary (16 U.S.C. 688(a), 668a). That Act is accordingly entirely consistent with the newly enunciated federal policy. That policy does not contemplate any commerce in feathers. Appellees have not suggested any religious motivation for their sale of feathers.

In sum, the language, structure and history of the Eagle Protection Act, like that of the Endangered Species Act considered in *TVA* v. *Hill*, 437 U.S. 153, 174 (1978), "indicates beyond doubt that Congress intended [the protected] species to be afforded the highest of priorities." Here, as there,

> While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the [Secretary's regulation] is wholly in accord with both the words of the statute and the intent of Congress. The plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, whatever the cost. (437 U.S. at 184).

The result should be no different here, where the species involved is the eagle, our national symbol, rather than the snail darter, "hardly an extraordinary" species (*id.* at 197, n. 3, Powell, J., dissenting), and the interests on the other side, although not insignificant, do not approach the millions of dollars of unrecoverable costs and the economic improvement of a substantial area of the country at stake in the Tellico Dam Project (*id.* at 157-158).

2. Our reading of the Eagle Protection Act creates no jarring precedent. The Congressional decision to protect the present eagle population by removing commercial incentives for killing them is consistent with well-tested legislative approaches to the protection of wildlife.

Many state statutes protect local wildlife from illegal hunting by banning the possession or sale of

similar wildlife legally taken outside the state.[24] Thus, in *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 38 (1908), this Court upheld a New York statute which made illegal the possession of certain game birds during the closed season, even though the specimens in question were legally taken in Europe and did not even resemble the domestic variety. Similarly, in *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936), this Court upheld the regulation by state law of the processing of sardines taken on the high seas and intended only for interstate and foreign consumption. State regulation was deemed appropriate because the state act "operate[d] as a shield against the covert depletion of the local supply, and thus tend[ed] to effectuate the policy of the law by rendering evasion of it less easy." 297 U.S. at 426.[25]

So, also, the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) has been interpreted as banning commerce in specimens of protected species, regardless of when or where the specimens were taken or the legality of that taking. *United States* v. *Kepler*,

---

[24] Congress has expressly permitted each state to treat all game, birds, and fish possessed within the state as if they were taken within that state. 16 U.S.C. 667e; 16 U.S.C. 852b.

[25] Similar provisions have regularly been upheld in state courts. *State* v. *Shattuck*, 96 Minn. 45, 104 N.W. 719 (Sup. Ct. 1905); *Commonwealth* v. *Savage*, 155 Mass. 278, 29 N.E. 468 (Sup. Jud. Ct. 1892); *People* v. *Dornbos*, 127 Mich. 136, 86 N.W. 529 (Sup. Ct. Mich., 1901); *Javins* v. *United States*, 11 App. D.C. 345 (1897); *Maritime Packers* v. *Carpenter*, 99 N.H. 73, 105 A. 2d 38 (Sup. Ct. 1954); *Salasnek Fisheries, Inc.* v. *Cashner*, 9 Ohio App. 2d 233, 224 N.E. 2d 162 (Ct. App. 1967).

531 F. 2d 796 (6th Cir. 1976); *Delbay Pharmaceuticals Inc.* v. *Department of Commerce*, 409 F. Supp. 637 (D. D.C. 1976).[26] The Eagle Protection Act, having the same purpose to protect animals from extinction, may be supposed to intend the same absolute prohibition on commercial transactions.

B. *The Migratory Bird Treaty Act*

The Migratory Bird Treaty Act is strikingly similar to the Eagle Protection Act. Both are designed to protect the species of birds they safeguard from extinction (compare 54 Stat. 250 and 76 Stat. 1246 (Eagle Protection Act) with H.R. Rep. No. 243, 65th Cong., 2d Sess. (1918) and H.R. Rep. No. 93-936, 93d Cong., 2d Sess. (1974) (Migratory Bird Treaty Act).[27] Both broadly prohibit the taking, killing, possession, sale, purchase or barter of birds or bird parts except as allowed by permits that the Secretary is authorized to issue (compare 16 U.S.C. 668a (Eagle Protection Act) with 16 U.S.C. 703 (MBTA)). In addition, both define the birds to which they apply by reference to the species involved, thus in terms covering all birds within the species, not just the current populations of those birds.[28] The only relevant difference is that the MBTA does not so narrowly define the Secretary's discretion to issue permits as does the Eagle Protection Act. But his authority to ban all commercial transactions is not left in doubt.

Instead of specifying the precise circumstances in which permits may issue, in the MBTA "the Secretary is authorized and directed * * * to determine when, and to what extent, if at all, and by what

[26] In 1976, Congress amended the Endangered Species Act of 1973 to permit a limited exception for the sperm whale product involved in *Delbay Pharmaceuticals*. Endangered Species Act Amendments of 1976, Pub. L. No. 94-359, 90 Stat. 911. The narrow exception enacted confirms the accuracy of the *Delbay* court's reading of the general statutory provisions. The 1976 amendment required an application to the Secretary within one year of its passage, and any permit issued under the exception would have a life no longer than 3 years. 16 U.S.C. 1539(f)(3)(A); 16 U.S.C. 1539(f)(4)(C). The amendment also expressly did not excuse violations committed prior to the date of the amendment. 16 U.S.C. 1539(f)(7). See also 122 Cong. Rec. 3258 (1976) (Rep. Sullivan); 122 Cong. Rec. 3259 (1970) (Rep. Leggett).

[27] The district court was accordingly incorrect in distinguishing the basis for the enactment of the Endangered Species Act as "Congress' reaction to the practical circumstances presented by endangered and threatened species" (J.S. App. 9a). That same concern motivated the MBTA and the Eagle Protection Act and they should also be read consistently with their purpose—to provide effective protection to the species they cover.

[28] The MBTA defines the birds to which it applies as "any migratory bird * * * included in the terms of the Convention between the United States and Great Britain * * *, the United States and the United Mexican States * * *, and the United States and the Government of Japan." The conventions describe the birds within the treaty by reference to their species. See Article II, Convention between the United States and Great Britain, August 16, 1916, 39 Stat. 1702; Article IV, Convention Between the United States of America and the United Mexican States, February 7, 1936, 50 Stat. 1313; Article II, Convention Between the United States and Japan, March 4, 1972, 25 U.S.T. 3329. Article I, Convention between the United States and the United States and the Union of the Soviet Socialist Republic, November 19, 1976, 7 Envir. L. Rep. 40318.

means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export" of any bird or bird parts subject to the Act (16 U.S.C. 704). This greater discretion apparently reflects the more varied circumstances of the several bird populations covered by the Act, not all of which require the stringent protections Congress has provided for eagles. Congress has accordingly left judgments about the particular degree of protection appropriate for specific species to the Secretary.[29] That the MBTA does not itself prohibit the sale or purchase of parts of birds taken before the effective date of the Act implies no general exemption.[30] It simply means that the Secretary may permit such transactions if he concludes that they are consistent with the relevant treaties and the degree of protection appropriate for the present population of the species involved. The Secretary's regulations (50 C.F.R. 21.2, 21.12) reflect his conclusion that adequate protection of current migratory bird populations requires a ban on commercial transactions involving bird parts lawfully acquired before the effective date of federal protection, except between

[29] The Secretary has provided separately for certain species of depredating birds; 50 C.F.R. 21.41 to 21.45.

[30] When Congress intended an exception to the Act's applicability to all birds of the covered species, it made that exception explicit: the Act does not apply to the breeding of migratory game birds on farms, or to the sale of birds so bred under proper regulation to increase the food supply (16 U.S.C. 711).

public museums and other scientific and educational institutions.

Nothing in the MBTA, nor in the treaties it implements, suggests that this regulation exceeds the Secretary's authority—*i.e.*, that the Secretary may not protect the current populations of the species involved by eliminating the commercial incentive for killing them. Neither the Act nor the Treaties are limited to illegally taken birds.[31] Instead, they apply to all birds of the defined species (see note 28, *supra*). Moreover, the treaties recognize the need to impose special limitations on commercial uses of the protected birds and their products.[32] In substantially

[31] Appellees find such a limitation in the language of the Japanese Treaty. That treaty first defines migratory birds by reference to the characteristics of the species covered (Article II). It then prohibits the taking of migratory birds or their eggs, and "[a]ny sale, purchase or exchange of these birds or their eggs, taken illegally, alive or dead, and any sale, purchase or exchange of the products thereof or their parts" (Article III). But both "taken illegally" and "alive or dead" apparently modify "these birds [*i.e.*, birds of the defined species] or their eggs" and not "the products thereof [*i.e.*, of birds of the defined species] or their parts." In any event, a single ambiguous phrase in the treaty scarcely outweighs the clear intent expressed elsewhere in the treaty that the contracting parties will take whatever measures they find appropriate for the protection of the identified species (see, e.g., Articles IV, VII). The language of the Department of the Interior's comments and the Senate Report on the 1974 amendments to the MBTA, on which appellees also rely (Motion to Affirm at 11-12) simply track the ambiguous language of the Japanese treaty in describing its effect.

[32] For example, the Treaty with Great Britain contains exemptions permitting Eskimos and Indians to take certain birds for food or clothing on condition that no birds or parts

increasing the Act's penalties for commercial violations, 16 U.S.C. 707(b)-(c), Congress recognized that the survival of migratory birds is more seriously threatened by commercial than by non-commercial incentives for taking them. S. Rep. No. 1779, 86th Cong., 2d Sess. 1-2 (1960). Finally, at the time the Migratory Bird Treaty Act was passed, laws prohibiting sales of birds and game for the protection of living animals were common, including laws that made illegal commercial transactions in legally taken animals. See cases cited, *supra*, at pages 18-20. When Congress undertook to provide the Secretary with effective authority to protect migratory birds, it surely intended that he should possess such familiar tools.[33]

The court below nevertheless relied on three early district court cases refusing to apply the MBTA to birds or parts of birds taken before the Act was passed,[34] and concluded that Congress was aware of those cases when it amended the Act and either agreed with them or concluded that "a retrospective application" of the statutes would be unconstitutional

---

so taken are sold or offered for sale (Article II, paras. 1, 3, 39 Stat. 1703). Cf. S. Rep. No. 95-1175, 95th Cong., 2d Sess. 6 (1978).

[33] When Congress intends that acts protecting wildlife not apply to animals or parts of animals legally taken before they came under federal protection, it has made the exemption explicit. See *supra*, notes 19 and 26; 16 U.S.C. 1732(e).

[34] *United States* v. *Fuld Store Co.*, 262 F. 836 (D. Mont. 1920); *In re Informations Under Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States* v. *Marks*, 4 F. 2d 420 (S.D. Tex. 1925).

(J.S. App. 13a).[35] While we doubt that these cases were correctly decided in the 1920's,[36] they are in any event of little significance today in the light of more modern recognition of the extent to which the federal government may validly regulate commerce in wild animals. *Hughes* v. *Oklahoma*, No. 77-1439

---

[35] It is clear that the prohibition on current sales or exchanges of feathers involves no retroactive application of the Act. Sales occurring after the statute was enacted are prohibited, but pre-Act takings are not punished. See *Delbay Pharmaceuticals, Inc.* v. *Dep't of Commerce*, 409 F. Supp. 637, 642 (D. D.C. 1976).

[36] *Fuld* involved a criminal charge of possession and offer for sale of articles made from legally taken heron feathers. The court dismissed the information, taking the view that the owners of the articles would be deprived of property without just compensation if the Act applied and that forbidding mere possession might be unconstitutional as an ex post facto law. The Fifth Amendment argument has no merit today (see pages 30-34, *infra*), and the ex post facto argument could apply only where possession was made illegal, which is not the case here. *In re Informations* indicated that the Migratory Bird Treaty Act (a law the court found "more honored in the breach than in the observance," 281 F. at 549), and its regulations were not clear enough to forbid the sale of a legally taken, pre-protection stuffed and mounted duck. In our view, the Act itself is sufficiently clear, and the regulations in the present case remove any possible doubt. The rationale of *Marks* is not clear. The case appears to hold that Congress lacks the power to make illegal the sale of legally taken birds because it lacks a "general police power" over migratory birds, an incorrect proposition that is not pressed in the present case. The pleading requirement imposed by these cases—that the government in a criminal prosecution under the Act must allege that the birds were taken subsequent to passage of the Act—is rejected in *United States* v. *Hamel*, 534 F. 2d 1354 (9th Cir. 1976); *United States* v. *Blanket*, 391 F. Supp. 15, 19 n. 1 (W.D. Okla. 1975).

~~parts" (Article III). But both "taken illegally"~~ and "alive

(Apr. 24, 1979), slip op. 3-13.[37] In amending the MBTA in 1974, it is hardly probable that Congress adopted the restrictive interpretation given the Act in three district court cases in the 1920's. It is far more likely to have been familiar with, and relied on, the interpretation of the Act incorporated in the regulations of the agency responsible for its implementation,[38] and the scope of comparable statutes relating to the protection of wildlife.[39]

All that remains is a suggestion that the Secretary has abused his discretion in concluding that a ban on commercial transactions involving the parts of any protected bird, whenever taken, is an appropriate method of protecting current populations of migratory birds. But since that precise method of protection is incorporated into the Eagle Protection Act, it scarcely can be argued that Congress rejected it as a possible method of protection for migratory birds. To the extent that the objection is to the need for that protection with respect to any specific species of cov-

[37] More consistent with current law is *United States* v. *Richards*, 583 F.2d 491 (10th Cir. 1978), rejecting these early cases and upholding the application of regulations under the Migratory Bird Treaty Act to prohibit the sale of birds raised in captivity, without a showing that the birds were acquired after they became subject to federal protection. See also *Delbay Pharmaceuticals* v. *Department of Commerce*, *supra*; *United States* v. *Species of Wildlife*, 404 F. Supp. 1298 (E.D. N.Y. 1975); *United States* v. *Kepler*, 531 F.2d 796 (6th Cir. 1976); and see the discussion in part II, *infra*.

[38] See *supra*, page 22.

The relevant regulatory provisions have remained virtually unchanged since 1960 (25 Fed. Reg. 8399 (1960)).

[39] See *supra*, page 19.

ered bird (see, *e.g.*, J.S. App. 9a), that is a matter for the Secretary, not the courts, which "have no expert knowledge on the subject of endangered species," *TVA* v. *Hill*, *supra*, 437 U.S. at 194.[40]

II. The Eagle Protection Act And The Migratory Bird Treaty Act May Constitutionally Be Applied To Prohibit Commercial Transactions In The Feathers Of Birds Lawfully Killed Before Their Species Came Under Federal Protection

The district court concluded that the Eagle Protection Act and the MBTA are inapplicable to pre-existing artifacts in part because of "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird parts" (J.S. App. 13a). The suggestion is that the effect of the statutes, as implemented by the Department of the Interior, is to take private property without just compensation, in violation of the Fifth Amendment (Motion to Affirm at 3).[41] We turn to that question.

[40] The district court's conclusion that the "statutes may be enforced by less drastic regulatory procedures" J.S. App. 5a, similarly trenches on matters reserved to the Secretary's discretion. See page 14, *supra*, note 20.

[41] In their complaint appellees contended that the statutes and the Secretary's regulations constitute "a deprivation of propery without due process of law, in violation of the Fifth Amendment" (A. 18). That contention has apparently now been rephrased as a claim that the statutes as applied in the regulations constitute a taking of property without just compensation (see Motion to Affirm at 3). There is, in any event, no colorable due process claim here, since application of the statutes to parts of birds taken before the species came under federal protection clearly is rationally related to the protection of current bird populations. See *supra*, pages 13-14; *Delbay*

A. *Appellees' Standing To Present The Constitutional Challenge*

There is, at the outset, a serious question whether the appellees are in a position to assert that, as applied to *them*, the two Acts accomplish a taking of lawfully obtained property. The fact is that none of the appellees has alleged that he acquired any property interest in the protected bird feathers before commercial transactions were banned.

The complaint filed in the district court alleged only that appellees own or do business in artifacts containing feathers taken from protected birds, "which birds were obtained prior to the effective date of Federal protection of such birds" (A. 10-15). But the complaint avoids alleging that any of the appellees himself acquired any artifacts prior to the effective dates of federal protection.[42] That this omis-

Pharmaceuticals, Inc. v. *Department of Commerce, supra,* 409 F. Supp. at 644 (refusing to convene a three-judge court to consider the same due process claim under a similar statute). The protection of such populations is a legitimate federal interest. *Missouri* v. *Holland,* 252 U.S. 416 (1920).

Neither is there any merit to the suggestion of the court below, citing *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), that the statutes and regulations could not pass constitutional muster unless they were the least restrictive measures possible (J.S. App. 12a). *Shelton* involved a statute directly touching an individual's First Amendment right of association, rather than legislation affecting property interests in order to accomplish a legitimate congressional purpose. See *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 377 (1973); *Weinberger* v. *Salfi,* 422 U.S. 749, 768-774); *New York ex rel. Silz* v. *Hesterberg, supra.*

[42] Indeed, Appellee Kelley alleged only that he is an employee of Appellees Pierre and Sylvia Bovis, and that the

sion is intentional is indicated by the Motion to Affirm at 2, which, despite our flagging the defect in the Jurisdictional Statement (at 18-19), continues to allege impersonally that "the artifacts were created and lawfully owned prior to the effective date of Federal protection of birds within the Acts" (cf. Motion to Affirm at 8, 13). The inference is plain that appellees cannot say they themselves obtained the artifacts before the prohibition became effective.

This is not surprising. Except with respect to birds first protected in 1972 and 1974, it is most unlikely that appellees have held for sale artifacts containing feathers covered by either federal statute since the effective date of those Acts. We need only remember that the MBTA was enacted in 1918 and amended in 1937 to embrace additional species of migratory birds, and that eagles have been protected by the Eagle Protection Act since 1940 for bald

statutes as interpreted restrict his ability to engage in his chosen employment (A. 13-14). Appellee Eros alleged only a similar restriction on his ability to practice his occupation as an appraiser of Indian artifacts (A. 13), although he did assert ownership of several artifacts, some of which contain feathers from birds taken before they were federally protected (A. 50; see also note 16, *supra*). Even if the Fifth Amendment prohibition on the "taking of property for public use, without just compensation" applies to restrictions on occupations of this nature, any 'taking' involved is, as to these appellees, de minimis. For example, Kelley cannot participate in the sale of the 10 items identified by Bovis (A. 58-59). Both he and Eros can, however, continue to deal in other Indian artifacts, including pottery, bead work, silver, basketry and clothing, none of which typically include the feathers of protected birds.

eagles and 1963 for golden eagles. See *United States* v. *Allard*, 397 F. Supp. 429 (D. Mont. 1975).

Yet, of course, the only persons who properly can complain that their property was "taken" by the enactment of the statutes in suit are those who were, *at the time*, the owners of the affected artifacts. See *United States* v. *Allard*, 397 F. Supp. 429 (D. Mont. 1975). The value of any artifacts purchased by appellees *after* the effective date of the Act had already been diminished by the applicability of the Act. The price appellees paid presumably reflected that fact, and appellees now seek a windfall in the restoration of value to items they purchased when it was illegal to do so.[43] At all events, appellees are not in a position to contend that the Acts constituted a taking of their property.[44]

B. *The Merits of the Constitutional Claim*

Appellees would fare no better if we assume they have standing to raise the issue of whether the Acts constituted a taking of their property without just compensation. The claim is effectively foreclosed by *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978).

---

[43] If they paid more, appellees should not be heard to complain that they have suffered a loss as a result of a purchase forbidden by law. They must assume the risk if they gambled that the Secretary's regulations would be held unauthorized or the statutes declared unconstitutional and the result is otherwise.

[44] Appellees can have no constitutionally recognized property interest in artifacts they hope to purchase or simply hold on consignment (A. 59) Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

For the reasons noted above, it is far from clear that the Acts have had any significant adverse economic impact on appellees, or have interfered at all with their "distinct investment-backed expectations" (438 U.S. at 124; *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962)).[45] Moreover, since appellees' possession of the articles is undisturbed, there is no "physical invasion by the government" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124).[46] In sum, these Acts present yet another example of the appropriate adjustment of economic benefits and burdens to promote the common good. As this Court noted in *Penn Central*, *supra*, 438 U.S. at 124-125:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on

---

[45] The fact that they now possess many rare feathered artifacts does not indicate that they acquired them before the Acts applied to them at prices reflecting their pre-Act value. And since the Acts permit the possession or exhibition of the artifacts, they do not interfere with any legitimate expectations concerning articles acquired for personal enjoyment or exhibition.

[46] Nor is there any "acquisition[] (by the government) of resources to permit or facilitate uniquely public functions" (*Penn Central*, *supra*, 438 U.S. at 128.)

the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels have previously been devoted and thus caused substantial individualized harm. [Citations omitted.]

Appellees agree that *Penn Central* and the cases cited therein demonstrate that "the most valuable use of property can be prohibited without compensation;" but they insist that "some valuable uses must be permitted to remain" (Motion to Affirm at 15). The challenged Acts and regulations are unconstitutional, it is argued, because they "prohibit all valuable uses of whatever nature for the property of the Appellees" (*ibid.*). But we cannot accept that prohibiting the sale of appellees' feathered Indian artifacts makes them "wholly useless" (*ibid.*). They are still objects of rarity and interest that can be possessed for personal enjoyment or displayed for profit. This Court concluded in *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 301-303 (1920) that there was no unconstitutional taking of a brewery's stock of beer when Congress prohibited beer sales. Surely appellees' feathers retain at least as much value as the post-prohibition beer. See also *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Murphy* v. *California*, 225 U.S. 623 (1912); *Everard's Breweries* v. *Day*, 265 U.S. 545 (1924).

Finally, even if there is a taking, nothing in either of these Acts prevents an action in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, for the payment of just compensation.[47] That remedy would be available to anyone who could show an actual taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974).[48] It follows that these Acts do not take private property without just com-

[47] The Eagle Protection Act does prevent such an action in one narrow circumstance—when a federal grazing lease is cancelled because of a violation of the Act or regulations issued thereunder (16 U.S.C. 668(c)). Congress has thus specifically defined the single situation in which it does not intend that federal compensation be available.

[48] Appellees suggest (Motion to Affirm at 16) that they are entitled to fair compensation for their artifacts. However, their complaint sought only declaratory and injunctive relief (A. 9, 26-28). And, at all events, since they alleged losses exceeding $10,000 (A. 9, 10-14), the district court lacks jurisdiction to entertain appellees' Tucker Act claim. 28 U.S.C. 1346(a)(2).

pensation in violation of the Fifth Amendment. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 94 n. 39 (1978); *Delbay Pharmaceuticals, Inc.* v. *Dep't of Commerce*, *supra*, 409 F. Supp. at 645, n. 3.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

MAY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 292626 383